

Nos. 77-337 and 77-500

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES G. CASTOR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

HENRY Y. DEIN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The opinion of the court of appeals is reported at 558 F.
2d 379.

JURISDICTION

The judgment of the court of appeals was entered on July
8, 1977. A petition for rehearing was denied on August 9,
1977. The petition for a writ of certiorari in No. 77-337 was

filed on September 1, 1977. Mr. Justice Stevens extended the time for filing the petition in No. 77-500 to September 30, 1977, and it was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charges a violation of 18 U.S.C. 1341 when it alleges that the defendants devised a fraudulent scheme to procure licenses to operate retail liquor stores.
2. Whether the court of appeals applied the correct standard of review of the district court's dismissal of the indictment.
3. Whether 18 U.S.C. 1341 as construed by the court of appeals is unconstitutionally vague.

STATUTE INVOLVED

18 U.S.C. 1341 provides in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

STATEMENT

An indictment returned in the United States District Court for the Southern District of Indiana charged petitioners with one count of conspiracy to commit mail fraud and 14 substantive counts of mail fraud, in violation of 18 U.S.C. 371 and 1341. In brief, the indictment alleged that petitioners had devised and implemented an elaborate scheme to procure for themselves retail liquor store licenses that had been made available by the Indiana Alcoholic Beverage Commission through the use of dummy applicants who then transferred the licenses to a corporation controlled by the petitioners (Pet. App. A25-A40).¹

The district court granted petitioners' motion to dismiss all counts of the indictment on the ground that 18 U.S.C. 1341 makes unlawful only fraudulent schemes "for obtaining money or property" and that liquor licenses are neither "money" nor "property" under Indiana law (Pet. App. A19-A22). As an alternative ground, the district court held that none of the 14 mailings alleged in the substantive counts of the indictment was "even arguably necessary or in furtherance of the alleged scheme or artifice" (*id.* at A18).

The government appealed under 18 U.S.C. 3731, and the court of appeals reversed (Pet. App. A1-A13). Relying on its previous decisions and decisions from other circuits, the court held that "the mail fraud statute is not limited to fraudulent schemes that contemplate the actual loss of money or property" (*id.* at A5), and further concluded that in any event the scheme alleged did have the probable

¹Unless otherwise specified, references are to the petition in No. 77-337.

or potential effect of causing pecuniary loss to others, namely, the other unsuccessful applicants for licenses (*id.* at A6-A8).

With respect to the district court's conclusion concerning the mailings, the court held that the district court erred in dismissing the indictment as facially insufficient. First, the court held that the district court erred in considering whether the indictment itself alleged sufficient facts from which a jury could find the mailings were in furtherance of the scheme; the proper question was "whether the Government conceivably could produce evidence at trial showing that the designated mailings were for the purpose of executing the scheme" (*id.* at A8). After analyzing the mailings alleged, the court concluded that "we cannot say from the face of the indictment, that no evidence could be presented at trial to show that the charged mailings furthered the alleged fraudulent scheme" (*id.* at A13).

ARGUMENT

1. Petitioners' challenge to the adequacy of the indictment is premature. The ruling of the court of appeals reinstating the indictment puts petitioners in the same posture as if the district court had ruled against them in the first instance. Such a ruling would not have been subject to interlocutory appeal (*Abney v. United States*, 431 U.S. 651, 663), and there is no reason for this Court to grant interlocutory review at this juncture. Petitioners were indicted in December 1974 and have not yet been brought to trial. Review by this Court at this interlocutory stage would further postpone the trial. If petitioners are acquitted at trial, their claim would become moot. If they are convicted, "the issue resolved adversely to petitioners [in the court of appeals] is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Abney v. United States*, *supra*, 431 U.S. at 663.

2. In any event, petitioners' claims are without merit.

a. All petitioners contend (Pet. 77-337 at 8-13; Pet. 77-500 at 8) that the statutory prohibitions of 18 U.S.C. 1341 encompass only such fraudulent schemes as are for the purpose of obtaining money or property and that the scheme alleged in the indictment was not for such a purpose.

Petitioners' contention is foreclosed, first, by the terms of the statute, which prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * *." The placement of the comma after "scheme or artifice to defraud," followed by the disjunctive "or", indicates that a scheme to defraud is not limited to schemes for obtaining money or property, as the court below held, in accord with numerous other cases that have considered the issue (see Pet. App. A5-A6 and cases cited therein). Petitioners cite no cases to the contrary,² and indeed the evolution of the statutory language described at Pet. 8-9 demonstrates that Congress understood that a scheme for obtaining money or property and a scheme to defraud are not coextensive concepts.

Furthermore, as the court below correctly held, even if Section 1341 requires some money or property objective, or some element of pecuniary injury, the allegations in the indictment were sufficient. Petitioners do not deny that a liquor license confers a valuable right in its recipient, and the court of appeals noted that the licenses in this case "apparently can be sold for prices exceeding \$20,000 * * *" (Pet. App. A7, n. 4). The indictment alleged that

²None of the cases cited by petitioners (see Pet. 9-12) hold or suggest that a scheme to defraud under Section 1341 is limited to schemes for obtaining money or property.

petitioners fraudulently procured licenses that would have gone to other applicants but for the fraud. Preventing someone from obtaining something of monetary value that he would otherwise get causes pecuniary injury no less than taking away something of monetary value that the victim already has.³

b. There is no merit to petitioners' contention (Pet. 77-337 at 13-14; Pet. 77-500 at 15-18) that Section 1341 as construed by the court below is unconstitutionally vague. The crime of fraud has an ancient lineage and has been construed and applied in innumerable cases. We are aware of no cases holding that that offense is unconstitutionally vague.

c. Contrary to the contention of petitioner Dein (Pet. 77-500 at 9-13), the court of appeals applied the correct standard in reviewing the district court's dismissal of the indictment. Dismissal of an indictment is proper only if the indictment is insufficient on its face—that is, only if it fails to allege the essential elements of the offense or adequately to put the defendant on notice of the charge. See, e.g., *Hamling v. United States*, 418 U.S. 87, 117; *Sampson v. United States*, 371 U.S. 75, 76. An indictment is not required to allege the evidence that will prove the charge. The district court therefore was in error when it concluded that the government would not be able to prove that the mailings alleged were in furtherance of the

³Although the court of appeals declined to reach the issue (see Pet. App. A5), we submit as an alternative ground supporting the decision that liquor licenses could properly be considered "property" within the meaning of Section 1341. Whether Indiana law defines liquor licenses as "property" would not control the meaning of the term in a federal statute, and there is no basis for concluding that the term "property" in Section 1341 was not intended to include valuable and marketable rights of this kind. Cf. *Bell v. Burson*, 402 U.S. 535, 539.

scheme, and the court of appeals correctly reversed on this point.⁴

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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⁴Petitioners do not contend in this Court that the alleged mailings were not in furtherance of the scheme or that the district court's conclusion in that respect was correct (see Pet. 77-337 at 7, n. 3; Pet. 77-500 at 6, n. 4). Moreover the court of appeals' analysis of the mailings alleged in the indictments demonstrates how the government may well be able to prove that those mailings were in furtherance of the scheme (Pet. App. A11-A12).

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